

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

STATE OF TENNESSEE v. JOHNNY LYNN HEITZ

**Direct Appeal from the Criminal Court for Sullivan County
No. S51,051 Robert H. Montgomery, Jr., Judge**

No. E2007-02236-CCA-R3-CD - Filed November 26, 2008

The defendant, Johnny Lynn Heitz, was convicted by a Sullivan County jury of aggravated kidnapping, a Class B felony, and sentenced as a Range III offender to thirty years in the Department of Correction. On appeal, the defendant raises two issues for our review: (1) whether the evidence is sufficient to support the conviction; and (2) whether the trial court's application of enhancement factors not found by a jury violates the holding in *Gomez v. State*, 239 S.W.3d 733 (Tenn. 2007) ("*Gomez II*"). Following review of the record, we conclude that the evidence is sufficient to support the conviction and that *Gomez II* is inapplicable to the defendant's case, as he was correctly sentenced under the amended sentencing act. Thus, the judgment of conviction and sentence are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

C. Brad Sproles, Kingsport, Tennessee, for the appellant, Johnny Lynn Heitz.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry Staubus and Amber Massengill, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual Background

Shortly after 4:00 p.m., the victim arrived at the Finish Line Car Wash and drove her car into the second stall from the end. As she washed her vehicle, she noticed that a blue Chevrolet pickup truck pulled into the end stall. The victim first observed the defendant and a female passenger exit the truck and then heard the car wash activate in their stall. Shortly thereafter, the victim saw the defendant out of the corner of her eye as he walked past her stall toward the change machine. She then heard him say, "Do you have a dollar?" The victim ignored the question as she believed it was

directed to the female passenger. The defendant repeated the question, and the victim again ignored him. As the victim continued washing her car, the defendant “came up behind [her] and . . . put [her] throat in the crick of his arm and cut off her air,” making her unable to breathe. The defendant pulled her back tight against him, backed up close to the wall of the car wash, and told the victim twice to “Get in the car.” The defendant used force in restraining the victim, and she was unable to escape. The victim, initially, was not able to see the defendant, but, at some point during the encounter, she was able to turn and see him. After she began screaming, the victim was able to escape the defendant, and she ran toward the street with the intention of flagging down a car. According to the victim, the defendant’s actions caused her physical pain.

Before the victim reached the street, she encountered Ronnie Roberts, who had been washing his motorcycle in a separate stall. After hearing the victim scream and seeing her run from the stall, Roberts proceeded toward her. Roberts and the victim observed the defendant return to his truck and quickly exit the parking lot. Roberts observed that the victim was upset and crying, and she informed him that someone had tried to kidnap her. The victim saw the defendant’s license plate and began to continually recite the number out loud.

A security camera in place at the car wash filmed various areas of the car wash parking lot. The monitor was located inside M & M Sporting Goods, which was located next door to the car wash. On the monitor, Debbie Miller and Christy Bailey observed a woman run from a car wash stall in a panicked state. They also saw a blue Chevrolet truck fleeing the scene. Miller went to the car wash to investigate, and the victim informed her that someone had attacked her. Miller then escorted the victim inside the sporting goods store and phoned the police. She gave the videotape to police, and it was determined that the incident inside the stall, which was not visible on the tape, occurred in twenty-one seconds.

Once the license number noted by the victim was given to police, it was determined that the truck seen at the car wash was registered to the defendant. Based upon this, the victim was asked to participate in a photographic lineup, and she identified the defendant as her attacker. Afterwards, police proceeded to the defendant’s residence and took him into custody.

A Sullivan County grand jury subsequently returned an indictment charging the defendant with aggravated kidnapping. At trial, the defendant’s statement to police was admitted into evidence. In the statement, the defendant did not deny his presence at the scene or that he had approached the victim and asked her for a dollar. He acknowledged that he had touched the victim on her shoulder but denied that he had grabbed her. He stated that she became hysterical and that he panicked and fled the scene. Following the presentation of evidence, the defendant was convicted as charged. He was subsequently sentenced to a term of thirty years as a Range III offender. Following the denial of his motion for new trial, the defendant filed the instant appeal.¹

¹ As an initial matter, the State asserts that the appeal should be dismissed because no written denial of the motion for new trial was included in the appellate record. However, since the filing of the briefs in this case, the
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Analysis

On appeal, the defendant has raised two issues for review. First, he contends that the evidence is insufficient to support the conviction for aggravated kidnapping. Second, he contends that the trial court erred in applying enhancement factors which were not found by the jury, in violation of our supreme court's decision in *Gomez II*.

I. Sufficiency of the Evidence

When a challenge is made to the sufficiency of the evidence, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979); *see also* Tenn. R. App. P.13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt so that, on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

As relevant to this case, aggravated kidnapping is false imprisonment where the victim suffers bodily injury. T.C.A. § 39-13-304(a)(4) (2006). A person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty. T.C.A. § 39-13-302(a) (2006). Bodily injury is defined to include "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." T.C.A. § 39-11-106(2) (2006).

On appeal, the defendant challenges the sufficiency of the evidence based solely upon a challenge to the victim's credibility. According to the defendant, the only direct evidence of what occurred during the actual twenty-one seconds in which the crime occurred was given by the victim.

¹(...continued)

defendant moved to supplement the record with a written denial, which was granted by this court. As the written denial is now included in the record before us, the State's issue is moot.

He argues that according to the victim's testimony, the following occurred within the twenty-one-second period: (1) the defendant asked the victim, "Do you have a dollar?"; (2) the defendant walked across the car wash bay where the victim was located; (3) the victim continued washing her vehicle, walking partially around the car; (4) the defendant grabbed the victim around the neck; (5) the victim turned around to identify the defendant's face; (6) the victim dropped the spray wand and grabbed the defendant's arm; (7) the defendant said to the victim, "Get in the car."; (8) the defendant repeated, "Get in the car."; (9) the victim screamed multiple times; and (10) the victim ran out of the wash bay and across the parking lot. The defendant contends "that as a matter of fact, the events described by the victim during the twenty-one (21) second gap in the video tape could not have all transpired, so as to make the victim's testimony credible as the basis for a jury finding" him guilty beyond a reasonable doubt. While acknowledging that there is no "type of time component necessary to sustain a conviction of aggravated kidnapping," the defendant asserts that "each of the necessary elements to this crime, simply could not have occurred along with everything else that the victim testifies to during this particular period of time."

As noted, the victim's argument focuses solely on the credibility of the victim's testimony with regard to what occurred inside the car wash stall. However, all questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *Pappas*, 754 S.W.2d at 623. The jury viewed all the witnesses in this case, including the victim; heard their testimony; and observed their demeanor on the stand. The victim gave a specific account of what occurred inside the stall, and the jury, based upon its verdict of guilty, accredited that testimony. This court will not reweigh or reevaluate the evidence presented. *Cabbage*, 571 S.W.2d at 835.

Viewed in the light most favorable to the State, we conclude that the evidence is sufficient to support the verdict. The defendant does not deny that he was present at the car wash, that he approached the victim inside the stall, or that he fled the scene when the victim began screaming. His presence is corroborated by eyewitness testimony and by his picture on the video surveillance camera. The victim specifically testified that during the twenty-one-second interval of time, the defendant grabbed her from behind, wrapped his arm around her neck, pulled her back against him and into a wall, and told her to get inside the car. She testified that she could not breathe and that physical pain resulted. The victim managed to escape and run from the stall, and witnesses observed that she was upset. She later identified the defendant in a photographic lineup as her attacker. This evidence is more than sufficient to establish that the defendant knowingly confined the victim so as to interfere substantially with her liberty and in doing so caused her physical pain.

II. Sentence

Next, the defendant contends that his thirty-year sentence violates the holding of *Gomez II* regarding the Sixth Amendment right to a jury trial because of the trial court's reliance upon multiple enhancement factors which were not found by a jury. In imposing the maximum sentence for a Range III offender convicted of aggravated kidnapping, *see* T.C.A. § 39-13-304(b)(1) (2006), the trial court relied upon four enhancement factors: (1) a previous history of criminal convictions or

behavior in addition to those necessary to establish the range; (2) the defendant had previously failed to comply with the conditions of a sentence involving release into the community; (3) the defendant had no hesitation about committing a crime when the risk to human life was high; and (4) the defendant intentionally selected the victim based on her gender. *See* T.C.A. § 40-35-114 (1), (8), (10), & (17) (2006).

The defendant is correct that the Tennessee Supreme Court recently concluded that a trial court's enhancement of a defendant's sentence, on the basis of judicially determined facts other than a defendant's prior convictions, violated that defendant's constitutional right under the Sixth Amendment to the United States Constitution. *Gomez II*, 239 S.W.3d at 740. However, the holding of *Gomez II* applies only to defendants sentenced under Tennessee's pre-2005 sentencing act.

In response to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), our sentencing act was amended effective June 7, 2005. The Compiler's Notes to Tennessee Code Annotated section 40-35-310 provide that:

[o]ffenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

The defendant's crime occurred on August 2, 2005, after the effective date of the amended sentencing act. Thus, the defendant was sentenced pursuant to the amended act of 2005, which rendered the enhancement and mitigating factors merely advisory, not binding, on the trial court. T.C.A. § 40-35-210(c); *see State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). As such, there is no violation of the defendant's Sixth Amendment right based upon the court's application of enhancement factors. *See Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 871 (2007). Moreover, although not challenged by the defendant, we conclude that the record supports the enhancement factors found by the trial court, as well as the sentence imposed.

CONCLUSION

Based upon the foregoing, the judgment of conviction and resulting sentence are affirmed.

JOHN EVERETT WILLIAMS, JUDGE